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Foreseeable Racial Segregation— A Presumption Of Unconstitutionality

*United States v. School District
Of Omaha*, 521 F.2d 530 (1975).

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.¹

I. INTRODUCTION

With this historic language the Supreme Court in *Brown v. Board of Education*² held that state-imposed public school segregation was unconstitutional since it violated the equal protection clause of the fourteenth amendment.³ Remedial requirements were later promulgated in *Brown II*.⁴ There the Court held that "[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield" to that principle stated in *Brown I*,⁵ and that such action must be taken "with all deliberate speed."⁶

A great deal of litigation involving alleged state-imposed racial segregation in the public schools has been inspired by the *Brown* mandate. One of the most recent cases was *United States v. School District of Omaha*.⁷ The Department of Justice initiated that action,⁸ alleging that unconstitutional racial segregation existed

1. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

2. *Id.*

3. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

4. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

5. *Id.* at 298.

6. *Id.* at 301.

7. 389 F. Supp. 293 (D. Neb. 1974), *rev'd* 521 F.2d 530 (8th Cir. 1975).

8. Certain black students in the Omaha public schools and their parents

within the Omaha public schools and seeking remedial relief. The School District of Omaha, State of Nebraska, the Superintendent of Schools for the School District, and the twelve members of the Board of Education for the School District were named as defendants. Previously, a motion for preliminary injunction, after a full evidentiary hearing, had been denied by the same court.⁹

It was alleged that the defendants had engaged in a policy of intentional school segregation within the Omaha School District in violation of Title IV of the Civil Rights Act of 1964 and the fourteenth amendment of the United States Constitution. The plaintiffs sought affirmative relief through a mandatory court-imposed school desegregation order. After an extensive factual analysis, the district court concluded that there was insufficient evidence of intentional racial discrimination to justify judicial intervention, denied plaintiffs the relief sought, and dismissed their suit.¹⁰

This decision was appealed to the Court of Appeals for the Eighth Circuit,¹¹ where it was heard before a special three judge panel.¹² The appellate court reversed and remanded the decision of the district court, concluding that the lower court had applied an incorrect legal standard for determining segregative intent,¹³ and that there was sufficient evidence of intentional segregation within the Omaha School District to necessitate a judicial remedy. The court directed the Omaha School Board to promulgate and implement a complete desegregation program for the entire school district before the 1976-77 school year.¹⁴

as representatives of the aggrieved class were allowed to intervene as plaintiffs by court order pursuant to Fed. R. Civ. P. 24(b). *United States v. School Dist. of Omaha*, 367 F. Supp. 198 (D. Neb. 1973).

9. *United States v. School Dist. of Omaha*, 367 F. Supp. 179 (D. Neb. 1973).

10. [T]his Court is convinced that this record simply does not justify the finding and determination that the school authorities in question intentionally discriminated against minority students by practicing a deliberate policy of racial segregation. Without such a finding, the law does not require that a school system developed on the neighborhood plan, honestly and conscientiously framed and administered, without intention or purpose to discriminate racially, must be set aside or abandoned because a racial imbalance in certain schools sometimes is the result.

389 F. Supp. at 322.

11. 521 F.2d 530 (8th Cir. 1975).

12. The members of the special three judge panel were Warren L. Jones, Senior Circuit Judge, Fifth Circuit, Jacksonville, Florida; Myron H. Bright, Circuit Judge, Eighth Circuit, Fargo, North Dakota; and Gerald W. Heaney, Circuit Judge, Eighth Circuit, Duluth, Minnesota.

13. See notes 34-36 and accompanying text *infra*.

14. The court promulgated several guidelines to aid in implementing the integration remedy. They include these recommendations: (1) reas-

This Note will examine the opinions of the district court and court of appeals discussing each on its own merits, and then in relation to the other. An historical perspective will be developed to provide a basis for more complete understanding of the constitutional principles and issues surrounding desegregation litigation.

II. THE DECISION

The Omaha School District encompasses the majority of the City of Omaha, as well as parts of Sarpy County. Census figures indicate that in 1970 there were 34,431 blacks residing in Omaha, 9.9 percent of the total population.¹⁵ School board figures reveal that for the 1973-74 school year, black students comprised 19.8 percent of the total student enrollment.¹⁶ Blacks in Omaha generally reside in a racially identifiable neighborhood commonly referred to as the Near North Side, although currently there is evidence of a modest neighborhood expansion.¹⁷ Racial segregation in Omaha schools had never been statutorily or constitutionally maintained,¹⁸ but it had arisen subsequent to the *Brown I* mandate.¹⁹

In alleging that racial segregation in the Omaha Public Schools had been maintained by intentional state action, the plaintiffs relied on seven main factual categories: (1) segregation in the elementary schools as a product of the use of temporary classrooms, and de-

signment of students should be avoided wherever possible; (2) in schools with black enrollment below 25%, such enrollment shall not be increased above 25%; (3) in schools where black enrollment is between 25% and 35%, it should not be made to significantly increase; and (4) in those schools where black enrollment exceeds 35%, attendance policies should be altered so such attendance level does not exceed 35%. 521 F.2d at 546-47.

In a ruling, on July 7, 1975, denying a rehearing of the case by the full Eighth Circuit court, the three judge panel amended paragraph four to allow the district court in its discretion to deviate from these recommendations in the following respects: (1) those black schools with a current black enrollment exceeding 50% may be allowed to lower that enrollment level to 50% rather than 35%; and (2) those schools with a black enrollment between 35% and 50% may be allowed to maintain that level.

15. 389 F. Supp. at 297.

16. *Id.*

17. The district court indicated that there had been evidence of a gradual increase in black residential concentration in zones to the west and north of the Near North Side, as well as a small concentration of blacks residing in the southeastern portion of the school district. *Id.* at 298.

18. *Id.* at 296.

19. This fact is apparent from the district court's brief discussion of historical background information. *Id.* at 297-98.

layed conversion from a K-8 to K-6 system in certain racially identifiable schools;²⁰ (2) segregation in the junior high schools as a product of initial new school placement, delayed conversion to a K-6 system in specific elementary schools, and use of optional attendance zones; (3) segregation in the high schools pursuant to racially inspired student assignments; (4) segregation resulting from a special student transfer policy;²¹ (5) discrimination in hiring and assignment of black faculty and staff; (6) segregation pursuant to policies involving new school construction and additions to existing buildings; and (7) segregation resulting from general housing conditions and school board cooperation with real estate developers. The plaintiffs contended that these facts indicated a prima facie case of de jure segregation which resulted from a policy of intentional racial segregation initiated by the Omaha School Board. The defendant school board, in response, maintained that any segregation in the district was de facto in nature, and was the by-product of the strict implementation of a neutral neighborhood school policy.²²

The district court predicated its legal analysis on the constitutional principles enumerated by the Supreme Court in *Keyes v.*

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20. A K-8 school is a primary or elementary school housing grades one through eight. Conversely, a K-6 school houses only grades one through six, necessitating an intermediary junior high school. The plaintiffs alleged that the school board maintained certain predominantly white elementary schools as K-8 schools long after a system-wide conversion to a K-6 system was mandated, thereby preventing the white children that attended those schools from being assigned to a predominantly black junior high school. *Id.* at 298-300.
 21. In this respect, the plaintiffs alleged that the special student transfer policy increased segregation by allowing white students assigned to predominantly black schools to transfer to predominantly white schools. The plaintiffs also alleged that the transfer policy inherently discriminated against blacks by allowing a student to transfer only when his personal achievement level equalled or was superior to the average achievement level of the school to which he intended to transfer, and by requiring the student to furnish his own transportation. *Id.* at 311-17.
 22. "De jure segregation" has traditionally been defined as "segregation specifically mandated by law or by public policy pursued under color of law." *Hobson v. Hansen*, 269 F. Supp. 401, 492 (D.D.C. 1967). "De facto segregation", on the other hand, is defined as racial imbalance resulting merely "from the action of pupil assignment policies not based on race but upon social or other conditions for which government cannot be held responsible." *Id.* at 493. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972); Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405, 422 (1973). See generally Comment, *Keyes v. School District No. 1: Unlocking the Northern Schoolhouse Doors*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 124 (1974).

*School District No. 1*²³ and promulgated a two-tiered test for unconstitutional de jure segregation.²⁴ "[A] constitutional violation is found where: (1) There is a current condition of racial segregation; and (2) This condition has been caused or maintained by intentional state action."²⁵ The court conceded that a substantial degree of racial imbalance existed within the Omaha Public Schools and that the actions of the defendant school board constituted state action.²⁶

The primary issue then became "whether the racial imbalance [within the school district] has been intentionally caused or maintained by the defendants."²⁷ Since intent is a subjective concept provable only by objective criteria, to demonstrate it is a difficult task.²⁸ The district court recognized this burden²⁹ and set forth

23. 413 U.S. 189 (1973). *Keyes* was the first Supreme Court case to deal with segregation in a northern school district where a dual system of education had not previously been maintained. See notes 38-47 and accompanying text *infra*.

24. "[T]he legal principles upon which claims with respect to this school system must be resolved are those set forth by the Supreme Court in *Keyes*" 389 F. Supp. at 296.

25. *Id.* This interpretation of the *Keyes* doctrine is substantially, although not precisely, correct. Actually, the district court in *Keyes* outlined a four-pronged test to determine whether there was unconstitutional racial segregation in the Denver school district:

- (1) The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;
- (2) this action must have in fact created or aggravated segregation at the school or schools in question;
- (3) a current condition of segregation must exist; and
- (4) there must be a causal connection between the acts of the school administration complained of and the current condition of segregation.

Keyes v. School Dist. Number One, 313 F. Supp. 61, 73 (D. Colo. 1970). The Supreme Court did not have the opportunity to examine specifically the correctness of this test except in dicta, since the only issues presented to the Court for review dealt with the presumption of segregative intent once there had been an initial finding of de jure segregation in one portion of the school district. See note 46 *infra*.

26. 389 F. Supp. at 296. Under several authorities, most notably *Cisneros v. Corpus Christi Independent School Dist.*, 467 F.2d 142 (5th Cir. 1972), and *United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972), such legal admissions would in themselves appear sufficient for a finding of intentionally maintained de jure segregation. See note 50 *infra*.

27. 389 F. Supp. at 296.

28. Many authorities have recognized the difficulty of objectively determining intent. Chief Justice Warren once noted that where a statute is constitutional on its face, examining legislative history in search for unconstitutional intent approximates "guesswork." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). This problem in determining segregative intent is further magnified by "the extremely equivocal character of many school board decisions, the lack of extensive records, and

three principles to "keep in mind" when looking for segregative intent. First, the plaintiffs had the burden of proving intent by showing that a segregative policy was practiced over a meaningful or significant portion of the school district. Once this was done, the burden shifted to the defendants to show that their actions were not motivated by segregative intent.³⁰ Second, since intent was not readily admitted, it had to be inferred from the objective actions of the defendants.³¹ Finally, in interpreting *Keyes*' emphasis on intent,³² the court stated that "the natural and foreseeable consequences of the defendants' actions are neither determinative nor immaterial, but rather constitute one additional factor to be weighed in evaluating the defendants' overall intent."³³ This third principle was significant, since the court primarily relied upon it in concluding that the school board did not act with specific segregative intent.

The appellate court agreed with the district court that intent must be inferentially deduced,³⁴ but found reversible error in that the standard of proof promulgated by the district court for a showing of segregative intent did not adequately reflect current constitutional principles. According to the appellate court the proper

the ability of a truly segregative board to produce a 'clear' history of its policy formulation." Comment, *supra* note 22, at 142.

29. "A determination of the intent of a person or a public body with respect to action or inaction on any question is necessarily difficult." 389 F. Supp. at 296.
30. This principle is derived from the *Keyes* case, 413 U.S. at 208-09.
31. *Citing to United States v. Board of School Comm'rs of Indianapolis*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973).
32. See note 44 and accompanying text *infra*.
33. 389 F. Supp. at 297. As authority for this principle the district court cited to *Oliver v. Kalamazoo Bd. of Educ.*, 368 F. Supp. 143 (W.D. Mich. 1973). As shall be discussed later, reliance on this opinion for this particular principle of law may be misplaced. See notes 51-62 *infra*. The court also cited to the cases of *Johnson v. San Francisco Unified School Dist.*, 339 F. Supp. 1315 (N.D. Cal. 1971), *rev'd*, 500 F.2d 349 (9th Cir. 1974) and *Soria v. Oxnard School Dist. Bd. of Trustees*, 328 F. Supp. 155 (C.D. Cal. 1971), *rev'd*, 488 F.2d 579 (9th Cir. 1973) as examples of district court opinions which inferred segregative intent from natural and foreseeable consequences and which were reversed on appeal for lack of emphasis on intent. The *Johnson* and *Soria* district court opinions, however, went much further than implying segregative intent from natural and foreseeable consequences but implied a total rejection of the *de jure-de facto* distinction. It was primarily for this reason, in the wake of the *Keyes* decision, that the decisions were reversed.
34. "The District Court properly recognized that segregative intent usually must be inferred." 521 F.2d at 535. This conclusion was reached after the plaintiffs conceded that segregative intent was a prerequisite to a finding of unconstitutionality and an uncontested recognition that the Omaha Public Schools were in fact segregated. *Id.* at 533.

standard was "that a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation."³⁵ This presumption was rebuttable, shifting the burden of proof to the defendant school board to negate the inference.³⁶

The district court erred in failing to recognize that this presumption of segregative intent was implicit when acts or omissions which resulted in natural and foreseeable segregative consequences were proven. This error resulted in an improper analysis of the facts of the case. The appellate court concluded that under the "natural and foreseeable consequence test" there had been ample evidence to raise a presumption of segregative intent in five school board decision-making areas: faculty assignments, student transfers, optional attendance zones, school construction, and the deterioration of Technical High School.³⁷ The court determined that the defendants had failed to sustain their burden of negating the segregative inference, and, therefore, held that the Omaha School District was unconstitutionally segregated. An order was rendered requiring the school board to promulgate and implement a complete desegregation program under the supervision of the district court.

III. HISTORICAL PERSPECTIVE

The principal case upon which any analysis of alleged unconstitutional racial segregation in a northern school district must be founded is *Keyes v. School District No. 1*.³⁸ In that opinion the Supreme Court, for the first time, applied the mandates of *Brown* to northern school segregation.³⁹

35. *Id.* at 535-36.

36. *Id.* at 536. The court here is citing to 413 U.S. at 210.

37. The court of appeals held that school board action in creating an open attendance policy between Technical High School and Central High School, in deleting certain attractive vocational courses from the curriculum at Tech, in permitting Tech's enrollment to drop far below capacity, and in assigning most black high school teachers to Tech, combined to result in foreseeable and inevitable racial segregation at Technical High School. 521 F.2d at 544-46.

38. 413 U.S. 189 (1973). The prior opinions can be found at 445 F.2d 990 (10th Cir. 1971), *aff'g in part* 313 F. Supp. 90 (D. Colo. 1971) and 313 F. Supp. 61 (D. Colo. 1971), *preliminary injunction granted*, 303 F. Supp. 289 (D. Colo. 1969), *modifying* 303 F. Supp. 279 (D. Colo. 1969). Subsequent opinions are at 380 F. Supp. 673 (D. Colo. 1974) and 368 F. Supp. 207 (D. Colo. 1973).

39. Prior to *Keyes* the Supreme Court had dealt only with school segregation in southern school districts where racial segregation had previously been statutorily maintained. This history of statutorily reg-

Keyes dealt with alleged state-imposed racial segregation in the school district of Denver, Colorado. The Supreme Court, pursuant to an initial district court finding of *de jure* segregative practices within one segment of the school district,⁴⁰ held that sufficient *de jure* segregation existed within that portion of the district to give rise to a presumption of segregative intent over the entire district and thereby shift the burden of proof to the defendant school board.⁴¹ Upon remand, the district court held that the school board had not sufficiently sustained its burden of proof⁴² and imposed a court ordered system-wide desegregation remedy.⁴³

The significance of *Keyes* goes beyond the fact that it was the first Supreme Court decision to impose a court-ordered remedy for racial segregation in a northern school district. It reaffirmed the traditional *de jure-de facto* approach to school segregation,⁴⁴ with the additional requirement that before judicial remedial action could be taken, it must be shown that there was a dual school system maintained by intentional state action. *Keyes* was also significant in that for the first time, a showing of *de jure* segregation in only a "substantial or meaningful portion" of a school district was sufficient to raise the presumption that state-imposed segregation had been maintained over the entire district. Once this showing was made, the burden of proof shifted to the defendant school board to negate the presumption of segregative intent.⁴⁵

The *Keyes* opinion also had its obvious limitations. It dealt exclusively with the effect that a finding of *de jure* segregation in one portion of a school district would have in raising a presumption of segregative intent over the entire district.⁴⁶ Therefore, there

ulated racial segregation, combined with proof that segregation currently existed within the specific school district, was generally sufficient to invoke a judicial remedy. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). See also Comment, *Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case*, 45 U. COLO. L. REV. 457 (1974).

40. *Keyes v. School Dist. Number One*, 313 F. Supp. 61 (D. Colo. 1971); *Keyes v. School Dist. Number One*, 313 F. Supp. 90 (D. Colo. 1971).

41. 413 U.S. at 208.

42. 368 F. Supp. at 207.

43. 380 F. Supp. at 673.

44. "We emphasize that the differentiating factor between *de jure* segregation [dual] and so-called *de facto* segregation [unitary] . . . is purpose or intent to segregate." 413 U.S. at 208. (Emphasis in original).

45. 413 U.S. at 208.

46. "We [Supreme Court] granted petitioner's petition for certiorari to review the Court of Appeal's judgment insofar as it reversed that part of the District Court's Final Decree as pertained to the core city schools." *Id.* at 195. Thus the Court limited its review to deal only with one area of the Denver School District where segregation previ-

was no discussion of the proper legal standard and evidentiary requirements for making an initial determination of segregative intent. Furthermore, since the petitioners in *Keyes* conceded that proof of segregative intent was a prerequisite to a judicial remedy,⁴⁷ the Court did not have to consider whether de facto segregation in itself was sufficient to raise a presumption of unconstitutionality and invoke a judicial remedy.

Historically, northern courts have varied greatly on the burden of proof necessary to establish segregative intent. Early courts required a heavy burden and generally were willing to accept justifications for segregative policies grounded upon good faith.⁴⁸ Proof of knowledge of the segregative effects of various school board policies was usually not sufficient to establish segregative intent. However, more recent decisions have implied segregative intent where such conscious awareness was shown.⁴⁹ This awareness is generally inferred from the natural and foreseeable segregative consequences of such school board policies. Typical examples of discriminatory practices resulting in foreseeable racial imbalance

ously had not been found to have been maintained intentionally. The original finding by the district court of de jure segregation in the Park Hill area of Denver was not reviewed. See generally Comment, *supra* note 39, at 475.

47. Petitioners apparently concede for the purposes of this case that in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.
413 U.S. at 198.
48. *Downs v. Board of Educ.*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Deal v. Cincinnati Bd. of Educ.*, 244 F. Supp. 572 (S.D. Ohio 1965), *modified*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Barksdale v. Springfield School Comm.*, 237 F. Supp. 543 (D. Mass. 1963), *vacated*, 348 F.2d 261 (1st Cir. 1965); *Sealy v. Department of Pub. Instruction*, 159 F. Supp. 561 (E.D. Pa. 1957), *aff'd*, 252 F.2d 898 (3d Cir. 1958), *cert. denied*, 356 U.S. 975 (1958).
49. *Hart v. Community School Bd. of Educ.*, N.Y. School Dist. No. 21, 512 F.2d 37 (2d Cir. 1975); *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974); *Oliver v. Kalamazoo Bd. of Educ.*, 368 F. Supp. 143 (W.D. Mich. 1973); *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd in part and vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974).

The district court in *Keyes* inferred segregative intent from the placement of new schools with the "conscious knowledge" that segregation would result. 303 F. Supp. at 285. This language was approved in dicta by the Supreme Court. 413 U.S. at 201-02.

In *Bradley*, the Supreme Court gave its implied approval to the "natural and foreseeable consequence test" by affirming that portion of the district court's opinion in which such standard was used. "[U]nder our decision last Term in *Keyes* . . . the findings [of segregative intent] appear to be correct." 418 U.S. at 738 n.18.

are: construction of new schools; gerrymandering of school boundaries; special school transfer policies; use of optional attendance zones; hiring and assignment of faculty and staff; curriculum changes; and additions to and repair of existing schools.

Other courts have gone even further and infer segregative intent when the segregative impact of a school board policy is shown to be "reasonably foreseeable."⁵⁰ Adoption of this theory implies a breakdown of the traditional de jure-de facto distinction.

IV. CURRENT CONSTITUTIONAL PRINCIPLES

Recent desegregation cases from northern school districts exemplify current constitutional principles regarding proof of segregative intent. One such case was *Oliver v. Kalamazoo Board of Education*⁵¹ which dealt with alleged state-imposed racial segregation in the school system of Kalamazoo, Michigan. Confronted with a factual basis similar to that in the *Omaha* case, the Michigan district court applied a test for segregative intent promulgated upon the *Keyes* doctrine and specifically rejected other judicial precedents because they lacked the necessary emphasis on intent.⁵²

50. *Cisneros v. Corpus Christi Indep. School Dist.*, 467 F.2d 142 (5th Cir. 1972) (*en banc*), *cert. denied*, 413 U.S. 922 (1973); *United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972); *Hart v. Community School Bd. of Educ.*, N.Y. School Dist. No. 21, 383 F. Supp. 699 (E.D.N.Y. 1974).

The *Cisneros* decision is particularly significant because certiorari to the Supreme Court was denied just four days after the *Keyes* decision. Thus the Supreme Court may have acquiesced in the Fifth Circuit's apparent abandonment of the de jure-de facto dichotomy.

Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education. We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi school system is unconstitutional—not de facto, not de jure, but unconstitutional. (Emphasis added).

467 F.2d at 149. It must be noted, however, that Justices Berger, Stewart, Blackmun, and Rehnquist wanted to send the case back to the district court for further consideration in light of *Keyes*. See generally Comment, *supra* note 22, at 149.

51. 368 F. Supp. 143 (W.D. Mich. 1973), *aff'd sub nom. Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

52. As in the *Omaha* case, the district court in *Oliver* applied a two-tiered test for segregative intent. Once there has been a showing that segregation exists, the plaintiffs must then establish that (1) such segregation was caused or maintained by state action and (2) the state acted intentionally. The district court specifically rejected the less rigid requirements promulgated in *Cisneros*, choosing to follow *Keyes* and its renewed emphasis on intent.

Upon finding that racial segregation in fact existed within the school district and that school board action was properly classified as state action, the district court found the basic issue to be one of determining whether there was sufficient evidence to infer specific segregative intent on the part of the school authorities.

As in the *Omaha* case, the Michigan court recognized the difficulty of objectively proving a subjective concept and couched its analysis of intent on the tort theory that a reasonable man should be held to intend the natural consequences of his actions.⁵³ This principle, the court reasoned, was implicit within the authority of *Bradley v. Milliken*,⁵⁴ which had been cited with implied approval by the Supreme Court in *Keyes*.⁵⁵ From this rationale, the court concluded that a presumption of racially motivated segregative intent would arise upon a showing of any school board act or omission whose clearly foreseeable consequences would be to cause or maintain segregative conditions over a substantial portion of the school district.⁵⁶ The Michigan court used this analysis and found that there was intentional segregation in a school district which was administered under a neutral neighborhood attendance policy. The court emphasized that a "neighborhood" is defined when the school board draws the boundaries,⁵⁷ and that assigning a child to the school nearest his home "serves no compelling educational objective which supersedes constitutionally protected rights."⁵⁸

53. "In general, it is reasonable to infer that people intended the natural and probable consequences of acts knowingly done or knowingly omitted." 368 F. Supp. at 161.

54. It is established that where an appropriate factual showing has been made, including a showing that an existing segregated situation is to a significant extent the natural, probable, and actual result of the actions and inactions of the state and local agencies, the plaintiffs have laid an evidentiary foundation for the conclusion that the results, segregated schools, were intended to be reached by these authorities.

Id. at 162. The court here was citing to *Bradley v. Milliken*, 484 F.2d 215, 222, 241-42 (6th Cir. 1973) (*en banc*) and *Davis v. School Dist. of Pontiac*, 309 F. Supp. 734, 744 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971). For a more complete discussion of *Bradley* see note 49 *supra*.

55. 413 U.S. at 210.

56. [W]here consequences of failure to act are clearly foreseeable, and where those consequences are significant contributions to the creation or maintenance of segregated schools, the failure to act is deliberate and intentional. Moreover . . . the deliberate failure to act [to alleviate racial imbalance] by either state or local authorities must itself be actionable in this court.

368 F. Supp. at 178.

57. *Id.* at 166.

58. *Id.* at 164.

This decision was affirmed on appeal to the Court of Appeals for the Sixth Circuit,⁵⁹ which had had considerable experience with school desegregation litigation.⁶⁰ The court specifically affirmed the lower court's use of natural and foreseeable consequences as evidence of segregative intent. It summarized its legal conclusions in the following manner:

A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials, (2) with a segregative purpose, (3) which actually results in increased or continued segregation in the public schools. *A presumption of segregative purpose arises when plaintiffs establish that the natural, probable and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation.* The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.⁶¹

A petition for certiorari to the Supreme Court for review of this decree was denied.⁶²

Another recent decision, *Morgan v. Hennigan*,⁶³ involved alleged unconstitutional racial segregation in the school district of Boston, Massachusetts.⁶⁴ There the district court applied the *Keyes* requirements pursuant to a showing of de jure segregation and concluded that intent was the "paramount" issue for consideration.⁶⁵ In analyzing intent, the court first distinguished "motive" from "intent", stating that "[m]otive is what prompts a person to take some action", while intent "refers to his decision to do a particular act as a means of achieving that result."⁶⁶ Since intent is the primary element for showing de jure segregation, and because it necessarily involves subjective conceptualizations, the court reasoned that "intent . . . may not be proved directly . . . but may

59. *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974).

60. See *Berry v. School Dist. of City of Benton Harbor*, 505 F.2d 238 (6th Cir. 1974); *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974); *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973); *Davis v. School Dist. of Pontiac*, 443 F.2d 573 (6th Cir. 1971).

61. 508 F.2d at 182 (emphasis added).

62. 421 U.S. 963 (1975).

63. 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub. nom.* *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

64. This case and the resulting desegregation order initiated the recent racially motivated disturbances at South Boston High School.

65. The paramount issue in this case is whether the defendants acted with a "purpose of intent to segregate" either with a desire to bring about or continue segregation in the Boston schools or with knowledge that such segregation was certain, or substantially certain, to result from their actions.

379 F. Supp. at 478 (emphasis added).

66. *Id.*

be inferred from the surrounding circumstances."⁶⁷ Putting this analysis into its historical perspective, the court concluded that racial segregation, deliberately caused or maintained by overt or covert means, is unconstitutional, even if discrimination is not the sole motivation for such action.⁶⁸

By distinguishing "motive" from "intent", the district court created a highly objective standard to use to test for the existence of de jure segregation. Intent could be implied "from the surrounding circumstances." Since the set of "surrounding circumstances" would contain the "certain, or substantially certain" consequences of one's actions, the court impliedly affirmed the principle that school authorities will be held responsible for segregation which was the product of the natural and foreseeable consequences of their actions.

In affirming the *Morgan* case,⁶⁹ the Court of Appeals for the First Circuit reviewed the facts of the case in conjunction with the legal presumptions arrived at by the district court and concluded that the lower court was correct in its finding of unconstitutional racial segregation in the Boston public schools.⁷⁰ As with *Oliver*, an appeal for certiorari to the Supreme Court was denied.⁷¹

*Hart v. Community School Board of Brooklyn, N.Y. School District No. 21*⁷² was another case that affirmed the use of natural and foreseeable segregative consequences as a presumption of segregative intent in a de jure-de facto context. It involved alleged unconstitutional segregation in one predominantly black school in a

67. *Id.*

68. A long line of decisions beginning with *Brown v. Board of Education* . . . established that a dual school system explicitly imposed by law is unconstitutional. The *Keyes* case simply makes it clear that the intentional imposition of a dual school system by covert or subtle means is equally unconstitutional. It should be clearly understood that racial hostility is not the applicable standard. Segregation need not have been inspired by any particular racial attitude to be unconstitutional Also, the intent to segregate need not be the sole purpose for the defendants' actions; it need only be one of them.

Id.

69. *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974).

70. We have addressed the facts found and the district court's inferences drawn as to segregative purpose, and have found no error. Moreover, even if the individual instances were not by themselves capable of supporting a finding of discriminatory intent—and we think those addressed were sufficient—they clearly create a definite pattern of intentional segregatory motives and practices.

Id. at 592.

71. 421 U.S. 963 (1975).

72. 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2nd Cir. 1975).

New York City school district. The district court held that a presumption of segregative intent arose pursuant to the school board's failure to remedy foreseeable segregation caused by shifting residential patterns.⁷³ As a result of this, the New York school district was held to be unconstitutionally segregated and implementation of a complete desegregation remedy was ordered.

On appeal, the Court of Appeals for the Second Circuit affirmed this decision⁷⁴ and affirmed the proposition that natural and foreseeable segregative consequences were sufficient to give rise to a presumption of segregative intent. The court reasoned that intent was an inherently illusive concept especially when it dealt with group motivation, and that to require proof of intent beyond natural and foreseeable consequences was to assign an impossible task. However, the court refused to go as far as the district court in including avoidable consequences as additional proof of intentional segregation.⁷⁵

Several conclusions can be drawn from this discussion of recent school desegregation litigation. First, segregative intent will generally be the critical issue in any attempt to prove unconstitutional racial segregation within a particular school district. This fact is witnessed most dramatically in the *Morgan* case, where, as a prerequisite to the proof of de jure segregation, the district court specifically distinguished intent and motive.⁷⁶ Both the district court

73. A school board which neglects to avoid racial segregation in its school is itself causing or bringing about, as an agency of the state, racial segregation. This is so because a school board, like other legal entities, must be held accountable for the natural, foreseeable, and avoidable consequences of its activities and policies.

383 F. Supp. at 734. The district court inferred segregative intent when neighborhoods which were used to determine school assignments were racially identifiable. The court termed such policy "racial classification once-removed." *Id.* at 735.

74. 512 F.2d 37 (2d Cir. 1975).

75. [W]e believe that a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. . . .

To say that foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions. When we consider the motivation of people constituting a school board, the task would be even harder, for we are dealing with a collective will. . . .

The more orthodox test is the objective one. . . . The design or intent thought to be prerequisite to a de jure finding may be evidenced by the performance of acts, the foreseeable consequence of which is segregation.

Id. at 50-51.

76. See note 66 and accompanying text *supra*.

and court of appeals in the *Omaha* case recognized the significance of the proof of segregative intent, and both predicated their respective opinions upon this narrow issue. Second, the recent constitutional trend has been to treat natural and foreseeable segregative consequences as presumptive of segregative intent.⁷⁷ School board decisions necessarily involve group will, which can not be readily ascertained by objective proof.⁷⁸ However, the "natural and foreseeable test" mitigates the onerous evidentiary burden of proving intent by providing an objective framework from which courts can imply a rebuttable segregative presumption. This standard is realistic in its approach since it requires the plaintiffs to prove something that is ascertainable from objective criteria. Once this proof has been met, the burden shifts to the defendant-school board to negate the inference of segregative intent which has been shown to be objectively apparent from its policies and actions. Thus, the "natural and foreseeable consequences test" reflects fairly and accurately the relative positions of the respective parties in the litigation as far as their ability to ascertain and accumulate evidence.

As pointed out by the court of appeals in the *Omaha* case, the district court's failure to recognize the presumption of segregative intent inherent in natural and foreseeable segregative consequences was its principal error.⁷⁹ Even more significant, however, was the district court's failure to promulgate an adequate legal standard for determining segregative intent. The court merely stated that natural and foreseeable consequences constitute only "one additional factor to be weighed in evaluating intent."⁸⁰ What these "addi-

77. See notes 51-75 and accompanying text *supra*. One commentator has stated that the *Keyes* doctrine could stand for the principle that intent could now be inferred where school authorities undertake facially innocent conduct, such as implementing a neighborhood school policy over a large racially identifiable residential area, when the end result is racial segregation. See Comment, *supra* note 22, at 150.

78. Since intent is a subjective concept and not readily observable, it can be proved only by objective criteria such as statements or actions. "[W]e can only emphasize that there are very few cases of school segregation today in which the defendants admit that they had an improper intent. Such intent may then be properly inferred from the objective actions." *United States v. Board of School Comm'rs of Indianapolis*, 474 F.2d 81, 88 (7th Cir. 1973).

79. See notes 34-37 and accompanying text *supra*.

80. See note 33 and accompanying text *supra*. The need for adequate legal guidelines for determining segregative intent was recognized by the Supreme Court in *Keyes*. Although the requirements for the initial determination of intent were not specifically at issue, in dicta the Court promulgated a standard based upon examples of specific hypothetical acts by a school board which would provide the "predicate"

tional factors" were never specifically expressed. The result was a factual analysis by the district court laced with rationalization and question begging.⁸¹

The court of appeals, on the other hand, promulgated a legal standard for determining intent which was based on recent federal desegregation decisions. The court referred to both the *Hart* and *Oliver* cases in concluding that acts or omissions having natural and foreseeable segregative consequences imply a rebuttable presumption of segregative intent.⁸² Application of this constitutional standard resulted in an objective analysis of the facts of the particular case. The appellate court reversed the district court, concluding that there was sufficient evidence to raise a presumption of segregative intent within the Omaha School District. A desegregation remedy was ordered accordingly.

V. CONCLUSION

The success or failure of modern desegregation litigation will hinge on proof of segregative intent. Intent is a subjective concept best ascertained through objective proof of what are the natural and foreseeable consequences of school board acts or omissions. In the *Omaha* case, the district court's failure to apply a presumption of unconstitutional segregation to school board decisions, which produced natural and foreseeable segregative consequences, resulted in reversal by the court of appeals. By applying this segregative presumption, the appellate court concluded that the Omaha School District was in fact unconstitutionally segregated. This necessitated a judicial remedy. In its historical perspective, the legal standard promulgated by the court of appeals for determining segregative intent and the conclusions derived therefrom are neither unique nor unprecedented; they are correct. "Separate ed-

for the inference that a dual school system existed. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 201-02 (1973).

81. At one point in its opinion, in discussing racial segregation allegedly maintained by the use of portable classrooms at several overcrowded, predominantly black elementary schools, the district court stated:

The Court agrees that some restructuring was possible which would have increased a better racial balance at these schools But it is also clear that at the time in question, this restructuring of enrollments . . . simply was not a method used by the School District to alleviate overcrowding.

389 F. Supp. at 299. Since the policies of the school board were being examined for segregative intent, to justify the segregative impact of a school board policy by reference to that policy was begging the question.

82. See note 35 and accompanying text *supra*.

ucational facilities are inherently unequal;"⁸³ all vestiges of state-imposed racial segregation are to be eliminated "root and branch."⁸⁴

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83. 347 U.S. at 495.

84. *Green v. School Bd. of New Kent County*, 391 U.S. 430, 438 (1968).